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The Nullification of Attachments; Sovereign Immunity and the International Emergency Economic Powers Act (IEEPA)

context. None of these things are ends in themselves. They involve objectives that have to be weighed against others. This leads to the very final point, which Bob Mundheim and Charlie Brower have both raised. Given the ambiguity of article 52, in other respects, what is the advantage to the world community of interpreting that article in a way which would deny to a party against which force has been used or threatened the strategy of making a treaty to remove the force? Is it not self-defeating? If you think of that in terms of the debate whether the threat or use of force includes economic force, you might very well conclude that article 52 has the potential of being the bane of the treaty system.

Ved Nanda: I share Hans Smit's concerns. Michael Reisman and others have written about forceful intervention,[87] its problems and likely abuse. But at this stage, to demand that there be a unqualified prohibition, to hold to the kind of narrow interpretation of the Charter that the purists hold, would be a great disservice to the international legal order.

Frank Mayer: The Reagan Administration apparently decided not to press the duress argument. As Covey Oliver observed,[88] duress cuts both ways. The Iranians might well consider the use of economic force in seizing twelve billion dollars worth of their assets as against fifty-two hostages the kind of coercive force which, from their point of view, aborts the settlement treaty. If you believe, as I do, that international arbitration of this nature will advance international order and the peaceful resolution of disputes, then we should leave well enough alone.

The Nullification of Attachments; Sovereign Immunity and the International Emergency Economic Powers Act (IEEPA)

Alan Swan: We should now turn to what is perhaps one of the more difficult, complex, and central areas of our overall problem, one that obviously leads to the constitutional discussion; namely, the statutory predicates for the Government's action in the private litigation. The Government has, by Executive order, undertaken to suspend the law suits,[89] to nullify the prejudgment attachments,[90] and to nullify

87. *E.g.*, Reisman, *Termination of the USSR's Treaty Right of Intervention in Iran*, 74 Am.J.Int'l L. 144 (1980).

88. *Supra* at 96.

89. Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981) [for text, see *infra* Appendix at 82].

90. Exec. Order No. 12277, 46 Fed. Reg. 7915 (1981) [for text, see *infra* Appendix at 64].

completely certain classes of claims.[91] I suppose there are several aspects to the subject. While it may not be possible to keep the discussion neatly separated along these lines, let me suggest the need to keep in mind a distinction between cases in which the prejudgment attachment was entirely dependant upon the government license under the Iranian Assets Control Regulations,[92] because such assets *were* otherwise immune from attachment under the Foreign Sovereign Immunites Act,[93] and cases in which the attached assets were *not* entitled to immunity under that act. To my mind, the question of whether the Executive can point to an adequate statutory predicate for its actions may differ markedly in these two cases. This also introduces the difficult problem of which assets are immune and which assets, if any, are not immune. In all events, to begin our exploration of these problems, I have asked Larry Newman to start by outlining the litigating position that his group is taking and then ask all of you to intervene with your views on the problem. Larry.

Lawrence Newman: I will try to give you a sort of overview of what the litigating position, as I understand it, is around the country, particularly in New York. I know that there have been constitutional challenges to the agreements in Washington, Boston, and Dallas. There is the *EDS*[94] opinion which finds that the Government did act unconstitutionally. Mark Feldman asked me last week what the New York claimants are going to be doing. I think the Government is very interested in what is going on in New York because there are briefs due on Monday, March 9, in the second circuit, and the Government has put in a very good brief.[95] It now appears that our adversary is primarily the Government. The procedural posture is that there were ninety-six cases consolidated before Judge Duffy in what we have, in New York, called a confirmation of attachments proceeding.[96] This actually represents the other side of a motion to vacate. Those obligatory motions to confirm were made, and Judge Duffy, to whom the

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91. Exec. Orders Nos. 12278-12281, 46 Fed. Reg. 7917-7924 (1981) [for texts, see *infra* Appendixes at 66-73].

92. 31 C.F.R. § 535 (1980), *supra* note 11.

93. Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, codified in, 28 U.S.C.A. §§ 1330, 1332(a)(2) to 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976) [hereinafter Immunities Act] [for selected portions of the text, see *infra* Appendix at 188].

94. Electronic Data Sys. Corp. v. Social Security Org. of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981).

95. See *supra* note 33.

96. N.Y. Civ. Prac. § 6211(b) (McKinney 1980). *See* New England Merchant's Nat'l Bank v. Iran Power, 502 F.Supp. 120, 123, n. 3 (S.D.N.Y. 1980).

task was assigned of ruling on the so-called "common questions," ruled in favor of the plaintiffs, employing a theory of his own that was not very strongly urged before him. Essentially, he concluded that the Government had taken away the sovereign immunity of Iran by virtue of having promulgated the freeze regulations. Interlocutory appeals were then taken by permission of Judge Duffy. The United States Government intervened, sought a stay, and moved to mandamus Judge Duffy. The Government's brief, a lengthy one, is an expansion of Civiletti's opinion of January 19th.[97]

Mark Feldman asked me what we were going to do and I told him I did not know because we had not really made up our minds. We have, I confess, had some difficulty in deciding how to do it. The reason is that people's positions differ. Many of the plaintiffs were not terribly unhappy with the arbitral tribunal. There are some—depending primarily on how the forum selection clause is interpreted—who are very unhappy. We left it that those of us on the steering committee who felt inclined to a particular position would write briefs in support of those positions. As a result, yesterday, March 6, the firms involved in these cases were given a choice of four different briefs. They were told, "You can sign your name to one of these briefs or, if you want, hurry up and write a brief by Monday." There was a brief proposed by Cleary, Gottlieb that dealt with the issue by suggesting that it really was not ripe for determination by the court of appeals and that it should be remanded to the district court for a determination on various factual questions. Townley, Updike prepared a brief that dealt with the problem of defining "enterprise" under the 1955 Treaty of Amity.[98] Coudert Brothers prepared a brief that was essentially along the lines of the *EDS*[99] position in Dallas. I call it a frontal

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97. Letter from Attorney General Benjamin Civiletti to President Carter (Jan. 19, 1981)(expressing an opinion on the legality of the United States–Iran Agreements) [hereinafter Civiletti Opinion Letter] [for text, see *infra* Appendix 84].

98. Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States–Iran, 8 U.S.T. 889, T.I.A.S. No. 3853, 284 U.N.T.S. 93. [hereinafter cited as 1955 Treaty] [for the text of selected portions of the 1955 Treaty, see *infra* Appendix at 176]. The relevant text is as follows:

> 4. No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Id. art. XI, para. 4.

99. 508 F. Supp. 1350 (N.D. Tex. 1981).

assault on the constitutionality of the Executive's actions, with the expectation that those who subscribed to this point of view were prepared to deal with the *status quo ante* that would result. Baker & McKenzie, our firm, took a middle ground. We are urging the court not to declare anything unconstitutional but to find that property rights, primarily the attachments, have been taken, but that the value of the taking or, indeed, whether the attachments were of any value, is a matter that cannot now be determined and will depend on how we are satisfied through the arbitral mechanism. If we find that we are fully satisfied, then we will not have a claim for the taking of a property right, but if not, then we will. I talked to my office over lunch time and it seems that there are eighteen firms that have signed on to our brief. I do not know how many have signed on to the others, but one of the firms that has apparently signed our brief is Coudert Brothers. They are apparently not mounting a frontal assault on the constitutionality of the settlement. If they are not doing so, I do not know who is. So we may find ourselves with some pussycats in New York as opposed to tigers.

In our brief, we address one of the concerns that we have had from the outset, namely, the role of the 1955 Treaty. It is a problem on which the Government has never really been forthcoming. I find that a little disturbing. It is our position, and has been our position, that the 1955 Treaty does constitute a waiver by Iran of immunity from prejudgment attachment. In its Amicus Brief in the *EDS* case before the second circuit last summer, and again in its Statement of Interest dated February 26, 1981, the Government has said that many of the claimants' attachments were invalid because, as with numerous other treaties of friendship, commerce, and navigation (FCN treaties), the 1955 Treaty waives immunity only for a publicly owned or controlled commercial or business enterprise and not for any other type of government agency. For example, it claims that the 1955 Treaty's waiver of immunity would apply to suits arising out of the purchase of goods by a government airline but not by the army. I mentioned this to the Justice Department and said, "You are, in fact, admitting that there is a waiver of immunity from attachment under the 1955 Treaty; why don't you just come out and say so?" They did not really give me an answer, but they did agree with my interpretation. I think it would be helpful, not only for these cases but for any other case involving an FCN treaty, to have this question settled. The whole role of the attachment of a foreign sovereign's assets and the question of the waiver of immunity from attachment can come up under something like eleven or twelve FCN treaties. I think it correct to say that there waivers of immunity from attachment contained in

those treaties, but apparently the Government's position is that the waiver is only in the case of an attachment against an enterprise that is engaged in some kind of commercial activity.

Mark Feldman: Let me put the Government's position in these terms: there is a waiver of immunity from suit in the 1955 Treaty and in certain other FCN treaties, but that waiver is only for suits against commercial enterprises, *qua* commercial enterprises. It does not apply to the Government itself. I think we would continue to maintain that, with regard to attachments, there is no explicit waiver under the 1955 Treaty. Thus, the only issue upon which we think one can have an argument concerns the relationship between the savings clause in section 1609 of the Immunities Act[100] and the 1955 Treaty. Section 1609, in effect, provides that a waiver of immunity from attachment under an existing international agreement remains in full effect even if the conditions for a waiver contained in the Immunities Act have not been met—even if under that Act the foreign government would be immune from attachment. The issue is whether the operation of that savings clause requires an explicit waiver of immunity from attachment in the preexisting international agreement; or may it, for purposes of that section, be an implicit waiver or something else? That is the issue. We do not think that there is an explicit waiver of immunity from attachment in the 1955 Treaty, but the Government has not yet taken a position on whether such an explicit waiver is required for purposes of the savings clause in section 1609.

Lawrence Newman: The Justice Department lawyers told me to read the footnote in the Government's Statement of Interest carefully and I would be able to divine from it the Government's position. I have read it carefully, I think. I do divine a position that there is a waiver but I do not know whether it comes out implicit or explicit.

Alan Swan: Let me just outline Judge Fisher's position on this issue[101] which I find interesting because I do not think Judge Duffy's effort[102] to get around his theory was entirely persuasive. Judge Fisher

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100. This section states:

> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act, the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

See *supra* note 93.

101. Behring Int'l Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979) (Fisher, J.).

102. New England Merchants Nat'l Bank v. Iran Power Co. 502 F. Supp. 120, 126 (S.D.N.Y. 1980).

concludes that the savings clause of section 1609 saves the 1955 Treaty as it was then written and understood. This meant that the treaty was to be interpreted according to ordinary canons of construction, unaffected by policies adopted twenty-one years later in the Immunities Act which requires an "explicit" waiver of immunity from prejudgement attachment.[103] He then examines the language of the 1955 Treaty and concludes that it waives immunity from all forms of judicial proceedings, including prejudgment attachments. He does not characterize this as either an explicit or implicit waiver. While the treaty does not, in so many words, mention prejudgment attachments, there are words in the treaty which under normal canons of construction indicate, according to Judge Fisher, that the parties contemplated such attachments. Whether that constitutes an implicit or explicit waiver is indeterminate and somewhat beside the point. The effort at categorization falls prey, it seems to me, to Judge Duffy's mistake. Judge Duffy was inclined to view the language in the 1955 Treaty through a lens colored by the policies of the Immunities Act, which requires an explicit waiver. I find that approach unpersuasive. The issue, I suggest, is whether Judge Fisher correctly read the intention of the parties as it stood when they negotiated and signed the 1955 Treaty. That, I suggest, is the only approach consistent with the apparent intention of Congress in section 1609 to leave waivers under existing agreements unaffected by the more restrictive requirements of the Immunities Act.

Hans Smit: The only time that you get to this question is if you assume that the provisions in the settlement with Iran that cancel all existing attachments are somehow or other to be disregarded. You never get to this issue unless you get by that hurdle.

Lawrence Newman: We are arguing the point because we do not want the court to avoid the constitutional issue by deciding that we

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103. 28 U.S.C.A. § 1610(d)(1978). The text states:

> The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—
>
> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

See *supra* note 93.

never had any rights anyway because there was not a waiver; that is what bothers us.

Hans Smit: Almost a year ago, I argued in Washington that one of the many deficiencies of the Foreign Sovereign Immunities Act was that it knocked out prejudgment attachments. I was very surprised to find on that occasion that both Jack Stevenson[104] and Monroe Leigh[105] agreed that that was one of the less desirable aspects of that Act. There seemed to be a fairly general consensus that that part of it should be knocked out. Now is there any initiative anywhere towards amending the Immunities Act, so that you would not have to cope with that problem?

Lawrence Newman: I do not know of any.

Mark Feldman: We have not had to crush any yet. [Laughter]

Edward Gordon: There is an initiative to harmonize the Immunities Act with the European Convention[106] and the State Immunities Act of England.[107]

Oscar Schachter: That project does not involve this problem.

Charles Brower: The project to which you refer is part of an effort by the International Law Association to draft an international convention. We now have, in the section of International Law of the American Bar Association, an *ad hoc* committee on revision of the Foreign Sovereign Immunities Act, the purpose of which is to develop proposed amendments in conjunction with other professional societies and then to try to work more formally with the interested government people to bring about a revision of the Immunities Act. There are a lot of areas that need work. Some are very simple, merely clarifying what virtually everybody understands to have been meant but which may not be totally clear. At the other end of the scale are proposed substantive revisions.

Edward Gordon: Do you recall from the history behind section 1609 whether these exeptions to the prohibition against prejudgment attachments engendered a lot of debate? Were they circulated and discussed?

Mark Feldman: Yes, Monroe Leigh and I argued for days, weeks and months. He finally caved in because we had to have a unanimous

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104. John R. Stevenson, former Legal Advisor, Department of State, 1969-72.

105. Monroe Leigh, former Legal Advisor, Department of State, 1975-77.

106. European Convention of State Immunity, May 16, 1972, *reprinted in* 11 Int'l Legal Materials 470 (1972).

107. State Immunity Act of 1978, c. 33.

position. The committees of Congress told us that we could not get a bill through unless we had a consensus of the whole Bar. So it was a long negotiation, over a period of two years.

Charles Brower: There was also some interchange with the House International Affairs Committee on the section 1604 and section 1609 language which refers to "existing" international agreements. I think that was inserted at the insistence of the Committee, which was concerned that the House of Representatives would not sign off on any legislation that was subject to revision through treaties, which only had to have Senate approval. Since it had relatively little practical impact—if any, when you think about it—the insertion was agreed to.

Michael Reisman: Back in 1955, at the time of the treaty with Iran and after the Tate Letter[108] the way to start a suit against a foreign sovereign was by prejudgment attachment. This, of course, was particularly rankling to foreign governments, and it was one of the big trade-offs in 1976. This meant that in 1955, when Iran was being persuaded to waive some of the incidents of sovereign immunity that created a disequilibrium in disputes with U.S. nationals, it could not have agreed to waive immunity from prejudgment attachments because it did not have that immunity to waive. In the 1955 Treaty the Iranian Government, in equalizing its position with U.S. nationals, in article 11, paragraph 4, had to waive things such as immunity from execution (and such immunity was certainly available to it). But immunity from prejudgment attachment was not available to it under any circumstance, so there was nothing to waive. Thus, if you follow a strict interpretation of the 1955 Treaty, there could be no waiver of immunity from prejudgment attachments. Iran could not have been invited to grant the waiver and if invited would have said, "What is there to waive?" Nor would an American negotiator have demanded the waiver.

Charles Brower: I would like to get back to the position taken by the State Department to the effect that immunity is waived only as to enterprises which are generally engaged in commercial activity. That position is wholly unimaginable in a treaty which was negotiated several years after the adoption of the restrictive theory of sovereign immunity. The whole purpose of the treaty was to limit the then existing immunities, rather than to expand them over what they were.

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108. Letter from Jack B. Tate, Acting Legal Advisor of the Dept. of State, to Phillip Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984 (1952) [hereinafter Tate Letter].

Now the answer that is given to that is that the treaty did limit immunities in certain respects. It did waive immunity from execution. But I still do not think that the Government's interpretation is, in fact, consistent with the restrictive theory.

Mark Feldman: Not at all.

Michael Reisman: I do not quite understand why the Government says that the waiver applies only to commercial matters. It seems to me that a waiver would cure virtually any immunity. In other words, if I say, "I waive immunity," I waive it whether I am a commercial or a political entity or involved in commercial or political activities. Why do you limit the effective waiver only to commercial entities or to political entities involved in commercial activities?

Mark Feldman: Because we are looking at the evidence. We look at the text of the treaty and at the legislative history of comparable treaties, and it is clear as a matter of record. Also, it was the interpretation of the Department publicly in proceedings before the Senate concerning the granting of Senatorial consent to similar treaties. It is reflected in published articles by negotiators who have written about it over the years. The foreign state waives the immunity of its commercial enterprises in the particulars spelled out in article 11. Attachment is not one of them. In other words, we are not engaged in deductive reasoning. We are just looking at facts. All the evidence that there is about the subject points in one direction. Now, whether you would imply a waiver of immunity from prejudgment attachments when the statute excludes implicit waivers with respect to such attachments is another issue.

Edward Gordon: Yes, but Mark, the statute has two exceptions: the section 1609 savings provision and section 1610(d) which requires an explicit waiver.[109] You can then read these two as identical, or substantially identical, or you can read them differently.

Mark Feldman: Yes, as I have already said, section 1609 is an issue and we have not taken a position on that issue.

Alan Swan: Let me understand this; you have taken a position that if the section 1609 savings clause is operative in the case of implied waivers—if you make that assumption—then there is, in fact, an implied waiver of immunity from prejudgment attachments in the 1955 Treaty?

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109. For the text of 28 U.S.C. § 1609, see *supra* note 100. For the text of 28 U.S.C. § 1610(d), see *supra* note 103.

Mark Feldman: No, that is precisely what we have not decided.

Edward Gordon: Have you taken a position that insofar as the question is whether there is an explicit waiver, there is no explicit waiver?

Mark Feldman: Right, there is no explicit waiver.

Michael Silverman: If the Statement of Interest reflects the Government's current position that there is a difference between a suit against a government airline and one against the army, the latter not being subject to the waiver, article 11 in paragraph 4 of the 1955 Treaty talks about enterprises engaged in commercial activities as opposed to commercial enterprises. The army certainly can be engaged in commercial activities, and that is the basis of the dispute in many decisions.

Alan Swan: Isn't there some history in the Immunities Act itself about the "nature" of the transaction?

Mark Feldman: That does not apply to the text of the 1955 Treaty; it applies to the Immunities Act.

Michael Silverman: Isn't the argument being made in relation to all FCN treaties that, under the better view, the waiver applies only to commercial enterprises? Yet, on the face of the 1955 Treaty, it seems to apply to enterprises engaged in commercial activities.

Mark Feldman: The words "engaged in commercial activities" are not the same thing as having committed or undertaken a transaction which may be commercial in nature. It is like engaged "in doing business." That is the way we read it and, as I said, all the contemporary commentary, the subsequent interpretations, and the presentations to Congress point to that as being the intention of the negotiators, whether that fits the restrictive theory of sovereign immunity or not. I just do not think people conduct themselves according to the canons of construction to which Charlie Brower had reference. You embark on a negotiation and the theory is you tell the foreign state, "If you want your state-owned enterprises to do business in our country, they are going to have be on the same plane as private enterprises with whom they are competing." None of these countries would have agreed to waive immunity for the army or what-have-you. It just is not done.

Hans Smit: After all, if after application of the Tate Letter the army buys shoes for its purposes, we apply the restrictive theory even though the army is not a commercial enterprise. So I think that this fits well within the Tate Letter. It does not make any difference how

you characterize the enterprise; it makes a difference what the enterprise in fact does.

Mark Feldman: That is true for the Immunities Act, but it was not clear before that Act that the Tate Letter would be applied that way. Certainly, it was not applied that way in any consistent manner by the State Department. But when we put forward the Immunities Act—as Charlie Brower's testimony indicates—we gave the restrictive theory the interpretation you indicate. We have not given that gloss to our FCN treaties because they are not unilateral, there are other parties to those treaties. They have a view, and it is the understanding that we have with them that must be carried forward. That understanding is very clear.

Charles Brower: I disagree with that. There is plenty of evidence the other way.

Mark Feldman: Well, particularly in connection with the negotiations with the Netherlands, it was very meticulously made a matter of record. I will send it to you. Look at our brief in the *EDS* case. It gives you quite a bit of it.

Cynthia Lichtenstein: Perhaps we need to distinguish here between the doctrine of restrictive immunity as an international law doctrine and what the parties intended to agree upon in a treaty between themselves. In the case of the 1955 Treaty you are interpreting the intent of the two parties as to what they meant by "enterprises engaged in commercial activities."

Mark Feldman: That is what I am trying to say. I would also say that it is impossible within the plain meaning of language to call a "state" an "enterprise."

Hans Smit: Oh! I find that very easy; it is a social or political enterprise engaged in commercial activities.

Michael Reisman: Yes, Mark, and your interpretation does include, within the ambit of the waiver, government agencies and instrumentalities. Therefore, "enterprise" does include government agencies and instrumentalities, and those agencies and instrumentalities compose the "state."

Mark Feldman: But which are engaged in enterprise? That is the whole point.

Edward Gordon: In Judge Duffy's decision[110] last October, he said that sovereign immunity itself was not a right under international

110. New England Merchants Nat'l Bank v. Iran Power Co., 502 F. Supp. 120 (S.D.N.Y. 1980).

law; that it is a matter of courtesy or comity or something of the sort. Is that position now at issue? If not, is it accepted that in the absence of a statute, such as the Immunities Act, sovereign immunity is to be withheld from an unfriendly state? The question has been raised whether Iran would be entitled to immunity in any case, since it was engaged in hostile activities against the United States; that it was not a friendly nation. If it is simply a matter of comity then presumably it is not entitled to immunity.

Charles Brower: That position has been argued, yes. Some of us did not go out of our way to argue it—we had differing views about its theoretical respectability—but it has been advanced strongly by a lot of good people. One terrific example, for use by professors who wish to teach their students how decisions are really made and why law cases move the way they do, is to be derived from the writings of Judge Duffy. You never would have had even Judge Duffy, I am convinced, arriving at the decision that he did, were it not for the fact that Judge Duffy had to get around Judge Duffy. He had to get around a case, predating the seizure of the hostages, in which he had decided, in *dictum*, that under the 1955 Treaty there was no waiver of immunity from prejudgment attachment.[111] Faced with an entirely different political situation in his later decision, the only way that he could uphold the attachments without contradicting himself was to adopt what, essentially, everybody thought was a somewhat dubious theory. The result was to place right back in the hands of the executive branch the determination of whether or not a foreign state enjoys sovereign immunity and totally take it out of the courts.

Mark Feldman: I have to confess that there was some question in the executive branch about the merits of that. I tried to sell the idea, but no one else would buy it—except Judge Duffy. I thought that once it was argued by the claimants it was open for us to grab on to it, but it was not thought to be too critical.

Hans Smit: I might mention that the first time I propounded this idea to a consortium of lawyers, they reacted in the same skeptical fashion. When I saw that Judge Duffy adopted it, I was heartened by the notion that, even though people laugh at me, I might be right.

Harold Maier: Mark, let me go back to what you were saying. Are you saying that the Government wanted that interpretation?

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111. Reading and Bates Corp. v. Nat'l Iranian Oil Co., 438 F.Supp. 724 (S.D.N.Y. 1979).

Mark Feldman: We did not take a position before the courts to that effect. We were discussing it. In State, Treasury, and Justice, we were discussing for many months what to do about this since we were always coming in with a request for a stay.

Harold Maier: Four years ago there were some great sighs of relief in the State Department, as I remember, when the Immunities Act finally passed. Everybody said: "We don't have to get involved in sovereign immunity cases anymore." You are not going back on that are you?

Mark Feldman: Ah, that is not a fair comment. [Laughter] As Charlie Brower always says, "We are defending the national interest and trying to resolve the Iranian crisis." That has nothing to do with trying to decide facts pertinent to determining questions of sovereign immunity—that we've given up to the courts.

Alan Swan: But is it not true, Mark, that your position on the constitutional issue is much aided—vastly aided—by Judge Duffy's position that, in fact, only your license validates the prejudgment attachment? If indeed it does flow from your license alone, then you are just revoking a license that you did not have to give in the first instance. In your brief, implicitly at least, that seems to be what you are pushing for.

Michael Reisman: I seem to be missing the constitutional issue. Are you saying that the power to grant the license, the IEEPA power, overrides the Sovereign Immunities Act?

Alan Swan: That, I agree, may be an issue; but I am making a different point here. Let us put it in two contexts. First, assume that, absent a freeze, the attached property would not have been immune from prejudgment attachment. Under that assumption the only purpose of the Treasury license was to overcome the adverse effect of the blocking order on the right of the American claimants to get a prejudgment attachment. Also, under that assumption, once the Government rescinds the blocking order, the license is essentially moot. The necessity for the license is removed. Under these circumstances, the Government's order of transfer and the order suspending or nullifying the attachments are in effect grants of immunity contrary to the denial of immunity by the Immunity Act read along with the 1955 Treaty. As such, they would have to be sustained on IEEPA authority. I doubt that the President can grant an immunity which a statute or a treaty denies, unless he can rest his action on another statute. This, I suggest, is the teaching of the *Steel Seizure Case.*[112] In other words,

112. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953).

IEEPA has to be interpreted as a grant of a right in the Executive to overcome the lack of immunity under the Immunities Act or the 1955 Treaty. Moreover, not only does the grant of power in IEEPA have to overcome the denial of immunity under the Immunities Act or the 1955 Treaty, but that power has to be in the form of a power to regulate the exercise of the normal jurisdiction of the federal courts—a power reserved to Congress under article III of the Constitution.[113]

On the other hand, if the property was, as Judge Duffy said, otherwise immune under the Immunities Act and the 1955 Treaty, and if the only way the claimant got the attachment was through a revocable license from the Treasury Department, then, of course, the Government could just revoke the license without interfering with the normal incidence of the judicial power.

Michael Silverman: The import of that leads to the question whether there is a deprivation or a taking which would give the claimants a right to go before the Court of Claims or some other court to sue for damages. The argument that some claimants could make is that there is an inchoate property right in these prejudgment attachments.

Mark Feldman: I do not think I understood what you were saying. I missed it at a key moment. Do you think that there is a limitation in article III on the exercise of the President's power under IEEPA to prevent the establishment or acquisition of new interests in property?

Alan Swan: No, I think it goes to the construction of the IEEPA power. Let me put it this way. I have in mind those lovely old cases where the Supreme Court struggled with the question whether a court that lacked the power to execute its judgments was an article III court.[114] As you know in *Glidden v. Zdanok*,[115] Justice Harlan struggles through that idea with reference to the Court of Claims, saying, well, there is a standby appropriations statute to pay judgments under $100,000 and the Congress has never turned down judgments over $100,000 anyway, so it seems plain that the power to execute judgments is an inherent power of an article III court. Now, the power in article III to limit the jurisdiction of such courts is given to Congress.

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113. U.S. CONST., art. III, § 1, *construed in* Sheldon v. Sill 49 U.S. (9 How.) 440 (1850).

114. United States v. Jones, 119 U.S. 447 (1886); Gordon v. United States, 69 U.S. (2 Wall) 561 (1865), *appendix at* 117 U.S. 697 (1885).

115. 370 U.S. 530 (1962).

It is a fairly extraordinary power. It seems to me, therefore, that if the attached property was not immune under the Immunities Act, the Government's reliance on IEEPA depends upon showing that IEEPA delegated to the Executive the power, first, to regulate the jurisdiction of the federal courts and, second, to exercise that power in a manner contrary to the grant of jurisdiction implicit in the Immunities Act's denial of immunity. That is quite an extraordinary authority to give to the Executive, and one must be careful before construing IEEPA as such a delegation of power. I doubt that, on its face, the language of IEEPA can bear the weight.

Mark Feldman: I thought of it as a substantive power, not a power dealing with the jurisdiction of the courts, but a power to prevent the acquisition through judicial process or otherwise of interests in the foreign-owned property.

Alan Swan: That is the question. Sure, IEEPA may be a grant of power to foreclose the acquisition of interests in property, or even to nullify interests in property. But which interests? Does it necessarily include interests acquired through the judicial process when, in fact, the nullification of those interests would foreclose an article III court from exercising a normal incidence of the judicial power?

Mark Feldman: If you could not do that, you could not have a blocking program.

Alan Swan: You can have a blocking program; a blocking program does not require that you foreclose the exercise of the judicial power as the Government proved when it said, by its regulations, "Go ahead with the judicial attachments."

Robert Mundheim: I do not understand what you mean. What the Government thought is that the Congress had said that the President may do various things, among them, "prevent or prohibit any acquisition." Under that language, the President says to the claimants, "You can not get any right in this property." Are you saying that the President may prohibit you from obtaining a right by voluntary agreement, but that you have a constitutional right to go to a court and say that the court ought to give you a right in this property because it is yours, because Iran promised to yield it to you, and the court has to effectuate that right? Is that the point? Are you then saying that, by this statute, one is being unconstitutionally precluded from going to court and asking the court to give them that kind of relief?

Alan Swan: Let me put it somewhat differently. When it comes to a statute with such broad language as IEEPA, one interpretation is

that it does authorize the President to foreclose a person from acquiring rights by private agreement. The question, however, is whether Congress intended to go a further step and authorize the President to prevent the acquisition of a right where the right would otherwise flow from the normal exercise of the judicial power to execute judgments. The problem becomes doubly acute if Congress, in the Immunities Act and the 1955 Treaty, read together, had made the property subject to that power of execution. These are prejudgment attachments in aid of execution. These are not prejudgment attachments for jurisdictional purposes. And that is a question which is not, it seems to me, determinable from the face of this statute.

Robert Mundheim: My understanding is that that kind of prohibition on judicial activity existed under the old Trading with the Enemy Act.[118]

Mark Feldman: Sixty years of history.

Robert Mundheim: Here you have a new act which reimposes or regrants that kind of authority in the light of our history.

Alan Swan: You may be right. But it is a matter to be established from history and the legislative record and not a matter that can be settled on the bare words of the statute. I think you have to look at the history very carefully.

Edward Gordon: I have a question along the lines of Bob Mundheim's point. Isn't the IEEPA meant to reduce the Executive's authority in matters like this, as opposed to maintaining the preexisting legal regime?

Alan Swan: Certainly on the vesting point.

Edward Gordon: So when you speak of extremely broad language, what is the significance of extremely broad language in a statute with that purpose?

Mark Feldman: You are overstating it.

Edward Gordon: I probably am.

Mark Feldman: It is precisely the vesting point. Otherwise, there is no evidence, as far as I know, of any intention of Congress to narrow the President's powers.

Edward Gordon: Well, it was part of a larger context. IEEPA did not simply reenact the old regime.

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116. Ch. 106 § 1, 40 Stat. 411 (1917) (codified in 50 App. U.S.C. §§ 1-6, 7-39, 41-44 (1976)).

Robert Mundheim: It was principally a procedural reform.

Edward Gordon: But would you not say that in the context of the mid-seventies, all of this legislation, including IEEPA, was designed to reassert the role of Congress and by implication, if not directly (I would say directly) reduce the Executive's total autonomy in matters touching the conduct of foreign relations?

Mark Feldman: I think Bob Mundheim was right. It was a procedural reform. As initially proposed, the National Emergencies Act (NEA)[117] left the Trading with the Enemy Act intact. Later that Act was excised from the NEA. We had hearings the following year and wanted to find a way of saving the substance of the old act. I think our purpose was very clear: to save the substance—but to put that substance into a new procedural framework, the focus of which was to prevent the indefinite continuation of states of national emergency into which one could then place separate substantive grants of regulatory authority. But the basic blocking power—the heart of the program—and the experience which comes out of the international claims situation was readily accepted by Congress. That was the most sacrosanct of all the powers that Congress intended to save, going so far as to preserve the ability of the Executive to maintain these prohibitions even after a national emergency had been terminated.

Stefan Riesenfeld: On your point concerning the history of this subject of blocking under the old Trading with the Enemy Act, the former Attorney General, Mr. Civiletti, in his opinion[118] to President Carter, cites a number of Supreme Court cases. You ought to read the cases cited there very carefully beginning with the discussion of *Orvis v. Brownell.*[119] You will see, I think, that they do not say exactly what they are cited for. You will see that the Supreme Court has distinguished between acquiring rights by attachment vis-à-vis the United States and acquiring rights vis-à-vis the old owner, which would here be Iran. The Court was very careful to say that attachments against blocked property created rights vis-à-vis the former owner, but did not create rights vis-à-vis the United States. If you now return the assets to the former owner, the attachment creditor loses his right against that owner, so I have difficulty in seeing how the cases which Mr. Civiletti cited really support the Government's action here. Those cases only affirmed that the United States has a right in blocked

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117. 50 U.S.C. §§ 1601-1651 (1978) [for text, see *infra* Appendix at 200].
118. Civiletti Opinion Letter, *supra* note 97.
119. 345 U.S. 183 (1953).

assets superior to the attachment creditor, not that the former owner has such a right. I am not saying that it cannot be done, but certainly the reliance on these cases proves too much.

Mark Feldman: Steve, would you repeat that?

Stefan Riesenfeld: Mr. Civiletti cites several cases[120] that say that once the government permits creditors to reach assets by attachment, those attachment creditors do not require any rights vis-à-vis the custodian, but that the creditor does acquire rights against the former owner, which in this case would be Iran. Now the United States Government says, "We will return these assests to the former owner and the attachment creditor will lose his rights." Such an action would not seem to find support in those cases. I am not saying that you could not find another theory, but at least the authorities cited by Mr. Civiletti prove, in my mind, just exactly the opposite from what he cites them for: that the attachment creditor does have rights in the property as against the former owner, which rights, by the sending of the property back to the former owner, are now lost.

Mark Feldman: That is where I am having trouble; if they are lost, they are not rights, they are not rights which are being protected from being divested.

Stefan Riesenfeld: Only because the United States is now sending them back to the former owner.

Mark Feldman: And in the cases cited by Civiletti, the Court said we could do that. Right?

Stefan Riesenfeld: No. In those old cases the Supreme Court only held that a creditor could not, by attachment, acquire any rights against the custodian. Therefore, the assets could vest in the United States in spite of the attachment. But, in those cases, the Court was equally adamant in saying that the attachment creditor did acquire rights against the former owner, the enemy alien. Now the United States, without vesting, is sending assets back to the former owner—Iran—and citing these cases as authority for doing so. That is not what those cases stand for.

Robert Mundheim: Just to clarify, were those rights acquired after a blocking order, or were they acquired under a preblocking attachment?

Stefan Riesenfeld: After blocking.

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120. The cases are Orvis v. Brownell, 345 U.S. 183 (1953) and Propper v. Clark, 337 U.S. 472 (1949). Statement of Interest, *supra* note 33.

Robert Mundheim: And without a license?

Stefan Riesenfeld: There was a license and the United States argued the point. The Supreme Court commented upon that statement and said that a creditor could acquire rights by attachment—unlicensed attachment or licensed attachment—against the former owner. Also, it said that the creditor could not acquire rights by unlicensed attachments against the custodian or the United States. And then the Court said that even if you were licensed, you did not acquire any rights against the vesting of the property in the United States. In making this point, I am only criticizing the reasoning of former Attorney General Civiletti. I do not say that you cannot accomplish your purpose on other grounds, but to cite these cases in support of the Government's action is not really correct. The Supreme Court very carefully distinguished between rights against the owner and rights against the custodian.

Mark Feldman: Steve, I am not sure that I agree with you. I say "I am not sure" quite sincerely. I have learned from experience that to question Professor Riesenfeld's reading of a case you must have a lot of nerve and you run a substantial risk of being wrong. Nevertheless, I take some comfort in the fact that I am certain those cases are unreadable, all of them. [Laughter]

Hans Smit: You mean the paper in the Justice Department has disintegrated?

Mark Feldman: No, it's the Supreme Court's Report. I do not think they say what Steve suggests. I think there was a complete turnaround—the typical situation of the Supreme Court reversing itself 180 degrees and then not wanting to admit it. Therefore, you get a terrible problem in drawing distinctions between the cases. There is one case I understand; the other one I do not understand at all. One of them said that the Government only got what the former owner had to give when it vested. By that time there had already been an attachment and, therefore, the attachment was valid against the custodian. In the *Orvis* case, it was just the opposite. It was not valid against the custodian. Why? The Court said that the attachment in that case was only intended to create an interest *inter se* and that it was not intended to create a vested right. Those are just words as far as I can make out, the facts are the same. So the Court changed its mind.

Stefan Riesenfeld: My only point is, why do you cite these decisions?

Mark Feldman: No, I think the Attorney General was right in citing *Orvis*. *Orvis* supports his position, perhaps *Propper v. Clark* does not. I do not know about the others; I leave that to you.

Michael Silverman: Again, on the point of history, isn't it clear that IEEPA does not give the Executive the power to vest property—as did the Trading with the Enemy Act? But isn't the practical effect of the Executive action the turning over of the monies to the Federal Reserve so that it can leave the country, and isn't that, in effect, vesting those monies in the United States?

Mark Feldman: That is what Judge Porter was saying. He says—in a wonderful phrase—that what the Executive is doing here is "vesting custody."[121] I do not think that is likely to stand up. The word "vesting" would mean to anybody the "taking" of a property interest, of title, or other usable interest in property.

Hans Smit: Well, in *Snaidach*,[122] Justice Harlan said that you take a person's property when you take away from him the temporary enjoyment of it.

Robert Mundheim: But that proves too much, Hans, because that means that every blocking is a vesting, and that is precisely what the Congress did not intend. To separate blocking and vesting you have to give each distinct meanings. To say that removing some of the powers of ownership and the ability to transfer the assets is a vesting, suggests that Congress in no way accomplished what it wanted to do. I do not think you normally make that interpretation.

Cynthia Lichtenstein: Assume a claimant who would have the right to a prejudgment attachment, however you argue it. Maybe there is an explicit waiver of immunity from prejudgment attachment. The claimant gets its prejudgment attachment and then comes the question whether under section 1702 of IEEPA the President can stay that attachment. Assume that under IEEPA the President can do it, unless you say that IEEPA itself, by giving the power to the President, violates the separation of powers. Assume next that Congress may authorize the President to stay the attachment; it is just a stay—the attachment is still there, it just is not operating but the claimant has not lost his legal right to have the property kept within the jurisdiction of the court. Next, the President orders the property to leave the country, thereby nullifying the attachment altogether. If we say that the President is authorized to do that by IEEPA, isn't that a taking for which the claimant has a constitutional right to compensation—"just compensation" for a taking in the public interest? The

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121. Electronic Data Sys. Corp. v. Social Security Org. of Iran, 508 F.Supp. 1350, 1361 (N.D. Tex. 1981).

122. Snaidach v. Family Finance Corp., 395 U.S 337 (1969).

claimant then goes into the Court of Claims and says, "My property was taken from me by the Government. The Government has the power to do it but to the extent that I lost the ability to realize on my original legal claim against the government of Iran, the attached property was actually used by the United States Government and the latter must compensate me."

Tone Grant: There is a question concerning who has the legal right to the Iranian assets frozen in the United States. The basis for the issuance of prejudgment attachments by the American courts was, in part, the statement by the Iranians that they were removing their assets from the United States and repudiating their obligations to U.S. nationals. Since there has not been an adjudication of the claims of U.S. nationals, there is an issue concerning what right, if any, the U.S. claimants have in the frozen assets. I believe that the Executive orders that have been issued provide, in part, that the assets that have been frozen in U.S. banks will be transferred to the Federal Reserve Bank for deposit into an account that will be made available for the payment of the claims of U.S. nationals. As a result of the prejudgment attachments which were issued, there is a question raised concerning what, if any, rights in the frozen assets the claimants have. I do not believe that there has necessarily been a divesting of the rights of any U.S. claimant until it is finally adjudicated whether the various claims are valid.

Edward Gordon: I need clarification on a point about attachments generally. Does the court have to be authorized by statute to grant that extraordinary remedy? Or could a court, in appropriate circumstances and in the absence of a statutory bar, grant that remedy? Can prejudgment attachments be granted under state law, for example, unless they are barred?

Alan Swan: Rule 64 of the Federal Rules of Civil Procedure[123] refers the federal courts to state statutes.

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123. The text of the rule is as follows:

Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus

Edward Gordon: Is it not, therefore, at least arguable that the right of those claimants who have obtained attachments might not be exclusively based on the Immunities Act? Isn't that at least a plausible argument?

Stefan Riesenfeld: The British courts did exactly that when they invented the "Mareva" injunction[124] which you heard about earlier. But our courts have said that they would not do anything like the "Mareva" injunction because they are bound by the rules of statutory attachment, which are granted by state law and taken over by the Federal Rules, and, therefore, because equity follows the law, they could not go beyond those statutes. Although they invented the temporary restraining order, they did not go so far as permitting "Mareva" injunctions because, they said, that is governed by statute and the courts therefore do not have the power. At least that is the orthodox explanation for the courts not granting equitable attachments or, in other words, applying the extraordinary powers which they otherwise might have.

Alan Swan: But isn't it true, Steve, that if the statutorily mandated Federal Rules had not said anything on the subject, those courts could, under their general equitable powers, have fashioned that kind of injunctive relief?

Stefan Riesenfeld: They might have done so.

Mark Feldman: There are two points I would make in stating the Government's position on some of these questions. First, in most of the cases against Iran—all but one as far as I am aware—there were no attachments until after the freeze. In fact, there were very few suits. The freeze held the assets here. It was only a couple of weeks later that there was an authorization for the attachments. That authorization was given within the framework of regulations which made clear that the attachments were revocable. So whatever the Supreme Court held in those other cases is probably not applicable to the situation where there is plain notice to the attachment creditor. The equities are just not there in the same sense as some might think.

Now, a second point: Everyone talks about state law and that is what these attachments are. I think it is time to raise *Pink*[125] and

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available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

FED. R. CIV. P. 64.

124. Mareva v. Int'l Bulkcarriers, [1975] 2 Lloyd's Rep. 509.

125. United States v. Pink, 315 U.S. 203 (1942).

Belmont[126] because what we are really talking about here, wholly apart from the IEEPA power, is the question of the President's constitutional authority to settle claims. You have a very clear statement by the Supreme Court in *Pink* and *Belmont* that state-created interests are overridden by the President's exercise of that power.

Alan Swan: Mark, you have laid a nice predicate for opening our discussion on the constitutional question. Are there any more comments regarding our current subject?

John Westburg: Just for the record I would point out that the Government, by blocking Iran's assets and shortly thereafter licensing the bringing of legal proceedings in the courts, did invite the claimants to bring these suits. Now, at the end of the game, after all the money they have invested in these suits, the claimants are understandably worried about them going down the drain. I just say that for the record!

Robert Mundheim: They knew the ground rules; they knew how the game might play out. They knew that they only had the typical type of license under the blocking statutes.

Mark Feldman: And when asked why they were bringing suits under these conditions, attorneys typically told us: "In case you don't get a program," or, "So that we will be there with priority, if your diplomacy fails." But now we have a program.

Hans Smit: To the extent the program tells you to go to Iran, it is not much of a program.

Mark Feldman: That is not our program.

Hans Smit: Ah, but it is under this agreement—as Iran reads it.

Mark Feldman: Well, that may be.

Alan Swan: Just as a point of history, Mark, did we ever have a situation where the Government blocked foreign assets for the purpose of securing American claims or, at least started off that way, and then entered into a settlement that called for the blocked assets to be transferred back to the foreign government while American claims on those assets were eliminated? Now, in the Iran situation, I realize some of the claims will go into the arbitral process and some assets are being set aside for that purpose. But with regard to the rest of the claims, have we ever had a settlement where blocked assets were not actually used to pay off American claims?

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126. United States v. Belmont, 301 U.S. 325 (1937).

Robert Mundheim: The Chinese assets! We got a promise of $80 million in cash from the Chinese and then said, "The blocked property is yours to the extent that you can persuade an American court that it is yours."

Alan Swan: And there were suits pending against China in the courts of the United States at that time?

Covey Oliver: Yes. One before Judge Goodman in the Northern District of California pending since 1952![127]

Mark Feldman: Is that so? I never knew that.

Constitutionality of the Settlement

Alan Swan: We're going to pick up where we left off at the end of last session with a discussion of the constitutionality of the agreements. There are a number of facets to this issue and it may be helpful to lay some of them out, especially since there are some particularly pertinent provisions in the agreements which we ought not to forget. At one level, we must concern ourselves with the power of the President to settle private international claims. One does not, I suppose, have much quarrel with the proposition that if the President can negotiate a settlement which results in full payment of all claims, he has the power to make that settlement. The problem arises where, as part of the settlement process, he undertakes to terminate or nullify the legal rights asserted by the private claimants and obtains, in return, only partial payment or, in some cases, no payment whatsoever. A variant of this, of course, is the situation where, as in the case of a substantial number of the claims against Iran, the President undertakes to foreclose the claimants' right to seek their remedy in a court of law and remands them to an alternative arbitral tribunal. I hope that the arbitral process will result in full payment of all provable claims, but there is an apprehension that that may not happen. I do not really know how one deals with that apprehension in the context of these constitutional issues at this time. Nevertheless, it is well to note article IV(3) of the Claims Settlement Agreement[128] which, as I understand it, provides that should a claimant receive an award from the arbitral tribunal and should there not be sufficient funds available to satisfy that award under the escrow account, the

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127. Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59 (N.D. Cal. 1952) *modified*, 209 F.2d 467 (9th Cir. 1953).

128. This provision provides: "Any award which the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation in accordance with its laws."